



# CIRCULAR

## STATE OF NEW JERSEY

### DEPARTMENT OF THE TREASURY

NO: 11-14-DPP	ORIGINATING AGENCY: DIVISION OF PURCHASE AND PROPERTY	PAGE 1 OF 8
EFFECTIVE DATE: 2-18-11	EXPIRATION DATE: INDEFINITE	SUPERSEDES: 09-11-DPP
SUBJECT: REQUESTS FOR WAIVERS OF ADVERTISING		
ATTENTION: ALL DIRECTORS OF ADMINISTRATION		
FOR INFORMATION CONTACT: ASSISTANT DIRECTOR, CONTRACT COMPLIANCE AND AUDIT UNIT		PHONE: (609) 292-5400 FAX: (609) 292-5899 E-MAIL: CCAU@treas.state.nj.us

#### I. POLICY

The law and policy of this State is for all goods and services to be procured, to the extent feasible, through publicly advertised bidding. Waivers of Advertising, as an exception to law and policy, are expressly limited by statutory design. Thus, "waivers," which result in contractual commitments by the State, are strictly scrutinized and require substantial justification from the requesting agency. Therefore, it is essential that the agency contact the Compliance and Audit Unit (CCAU) for pre-approval as soon as a procurement requirement is identified to determine if a Waiver of Advertising is the appropriate and legally justifiable procurement method.

Further, competition must be pursued by the agency for all waivers except for sole source procurements, as required under N.J.A.C. 17:12-1A.2(f)(2), unless the agency can justify why competition is not reasonable because of circumstances or factors prohibiting or inhibiting the solicitation of competition.

#### II. PURPOSE

To provide guidelines, instructions and criteria for submitting requests for State contracts when the requirement for advertising is waived because the request falls within the statutory exceptions to advertising set forth in N.J.S.A 52:34-9 and N.J.S.A. 52:34-10.

#### III. DEFINITIONS

A. The following terms and their definitions apply to this policy:

1. "Confirming Waiver" – State Contract created when a using agency directs a vendor to provide the goods and/or services to the State under the contract before the official Request for Waiver of Advertising Form (PB-129) has been signed by the Treasurer's Office. There are two types of confirming waivers: Authorized Confirming and Unauthorized Confirming.

2. "Authorized Confirming Waiver" – State contract created when a using agency directs a vendor to provide goods and/or services to the State after having been granted express, written approval by an authorized person at the Division of Purchase and Property (DPP) or the Treasurer's Office. This type of confirming waiver is to be requested only when there is a critical and immediate need to provide a service or a product that has a direct impact on the health and safety of the public. The vendor must agree to the State's Standard Terms and Conditions and must meet the requirements of P.L. 2005, c. 51 and Executive Order # 134 before approval will be granted. The formal Request for Waiver of Advertising (PB-129) and all supporting forms should be submitted to the CCAU, Waiver Coordinator, within three (3) business days of receipt of the written approval to proceed with the Authorized Confirming Waiver.
3. "Unauthorized Confirming Waiver" – State contract created when a using agency directs a vendor to provide goods and/or services to the State before the Request for Waiver of Advertising Form (PB-129) is signed by the Treasurer's Office and without seeking prior permission for an Authorized Confirming Waiver. Unauthorized Confirming Waivers are a serious departure from and violation of State procurement law, policy, and procedure.

Those employees responsible at the agency for the procurement can be held personally liable for the cost. In all such cases, DPP will notify the employee's supervisor and the head of the agency, in writing, of the violation, with a copy to the State Auditor, Office of Legislative Services.

4. "Sole Source Waiver" – State contract created without public advertisement pursuant to N.J.S.A. 52:34-10(c) because only one source of supply is available. The agency must be able to document, to the satisfaction of the Attorney General, that only one vendor can supply the required good or service.
5. "Public Exigency" – State contract procured when the life, safety, or health of the public must be sustained through the immediate performance of services or delivery of products.
6. "Professional Services" - As defined at N.J.S.A. 52:34-10.8, services performed by a person authorized by law to practice a recognized profession, the practice of which is regulated by law, or the performance of the services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training. Professional services include those services rendered in the provision of goods or performance of services that are original and creative in character in a recognized field of artistic endeavor as well as extraordinary, unspecifiable services if, after evaluation and assessment, the services cannot reasonably be described by written specifications. This definition is strictly enforced by the Attorney General.
7. "Technical Services" - Services that require the application of a special skill or practical knowledge in such areas as information technology, telecommunications, electronics, or other applied sciences.

#### IV. STATUTORY EXCEPTIONS PERMITTING WAIVERED CONTRACTS

##### A. N.J.S.A. 52:34-9(a)

Services to be performed by the contractor are of a technical and professional nature. See definition of "Professional Services" and "Technical Services" set forth in III. (A.) (6.) and III. (A.) (7.) above.

B. N.J.S.A. 52:34-9(b)

The purchase of perishable foods or subsistence supplies. Perishable or subsistence foods are those which spoil or deteriorate rapidly, i.e., fresh vegetables, meats, fish, dairy products and bread items.

C. N.J.S.A. 52:34-9(c)

The lease of such office space, office machinery, specialized equipment, buildings, or real property as may be required for the conduct of the State's business.

D. N.J.S.A. 52:34-9(d)

The acquisition of any real property by gift, grant purchase or any other lawful manner in the name of and for the use of the State for the purpose of State business in accordance with appropriations made when monies are required for the acquisition. This citation is reserved for use by the DPP only.

E. N.J.S.A. 52:34-9(e)

Supplies or services for which the prices after advertised bidding are not reasonable or have not been independently determined in open competition. This citation is reserved for use by the DPP only.

F. N.J.S.A. 52:34-10(a)

The purchase is to be made from, or the contract to be made with, the Federal or any State Government or any agency or political subdivision thereof.

G. N.J.S.A. 52:34-10(b)

Public exigency requires the immediate delivery of the articles or performance of the service. Waivers are granted for public exigency when the following conditions prevail and are documented by the using agency:

- ☐ A potential health or safety hazard exists;
- ☐ Homeland Security or other purchases of goods and services, which cannot be publicly advertised because of an overriding State safety or security concern;
- ☐ A critical agency mandate, statutory or operational requirement must be fulfilled immediately.

POOR PLANNING DOES NOT CONSTITUTE PUBLIC EXIGENCY.

H. N.J.S.A. 52:34-10(c)

Only one (1) source of supply is available. The agency must document thoroughly why the recommended contractor is the only available source that can provide the item or services required, and why seemingly comparable products do not satisfy the documented needs of the agency. A thorough explanation must be included as to what attempts were made to obtain competition and the results. Sole source justification is a legal determination subject to the review and approval of the Attorney General's office.

I. N.J.S.A. 52:34-10(d)

More favorable terms can be obtained from a primary source of supply. This citation should be used in cases where the intended purchase will be made directly from the prime manufacturer or supplier at a reduced cost, which results from the elimination of intermediaries, i.e., distributors, dealers, and jobbers. This citation can also be used when special or spot purchases are attainable at reduced cost or with more favorable delivery schedules.

J. N.J.S.A. 52:34-10(e)

Articles of wearing apparel that is styled or seasonal in character. This citation is reserved for use by DPP only. Agencies should not request the use of this citation.

K. N.J.S.A. 52:34-10(f)

Commodities traded on a national commodity exchange are to be purchased and market fluctuations require immediate action. This citation is reserved for use by the DPP only. Agencies should not request the use of this citation.

L. N.J.S.A. 52:34-10(g)

The equipment to be purchased is of a technical nature and the procurement thereof without advertising is necessary in order to assure standardization of equipment and interchangeability of parts in the public interest.

M. N.J.S.A. 52:34-10.6

Any purchase by the State of equipment, goods or services related to homeland security and domestic preparedness, that is paid for or reimbursed by federal funds awarded by the U.S. Department of Homeland Security or other federal agency, from vendors participating in a federal procurement program established by a federal department or agency or the purchase has been approved by the State Treasurer in consultation with the New Jersey Domestic Security Preparedness Task Force. The Director of the Division of Purchase and Property may also enter into or participate in purchasing agreements with one or more other states, or political subdivisions or compact agencies thereof, for the purchase of such equipment, goods, or services to meet the domestic preparedness and homeland security needs of this State.

N. N.J.S.A. 52:34-6.2(a) or (b)

Any purchase made from a cooperative purchasing agreement entered into by the Director of the Division of Purchase and Property.

O. N.J.S.A. 52:34-6.1

Goods or services purchased from federal procurement programs, including GSA Schedules, processed in accordance with the Circular dealing specifically with purchases from such federal procurement programs.

## V. PROCEDURE

### A. Pre-approval

Pre-approval to use the waiver process must be requested from the DPP before proceeding with any waived contract. The agency must forward an e-mail to the DPP at [waiverpreapproval@treas.state.nj.us](mailto:waiverpreapproval@treas.state.nj.us) setting forth:

1. That the agency has conducted a thorough search of State contracts and that the good or service is not available under State contract. Minor differences in product specification are not justification for an agency to bypass existing State contracts to obtain certain products.
2. The specific commodity or service that the agency seeks to procure by way of a waived contract;
3. The statutory citation the agency will use to justify the proposed waived contract and the facts to support that justification;
4. How competition will be sought (unless the product or service is to be supplied by a "sole source," or is a public exigency that requires immediate procurement of the good or service);
5. The amount of the waived contract;
6. The term of the waived contract, i.e. its start and end dates;
7. The funding source. A Certificate of Funding is only acceptable for agencies whose expenditure is not tracked in MACS-E.

### B. OMB and OIT Approvals

Procurement of professional and consultant(s) services, telecommunications, information technology equipment, hardware and software, can only be made with the express approval of the appropriate State agencies as required under Circular 09-10DPP/OMB/OIT. **Failure to provide the required approval documents with the waiver will result in automatic rejection and return of the waiver package to the agency.**

#### 1. Consultants and Professional Services

All requests to hire consultants to perform professional services that exceed \$250,000 must be approved by the Office of Management and Budget (OMB) pursuant to Circular 09-10 DPP/OMB/OIT. Approval documents must be submitted with the waiver request. The present contact at OMB is, Robert Peden, Deputy Director, P.O. Box 221, Trenton, NJ 08625.

Phone: (609) 633-7426 Fax: (609) 633-8179

A copy of the contractually required final report(s) for consultant services must be submitted to the Monitoring Unit within OMB. Please do not submit the reports to the DPP.

#### 2. Consultant Services and Approval of Telecommunications, Information Technology Consultant Services, Equipment Hardware, and Software

All waivers for services and equipment acquisitions for telecommunications and/or information technology must be approved by OIT prior to submission to DPP for processing and must comply with Circulars 07-06-DPP/OIT and -OMB/OIT. Approval documents must be submitted with the waiver request. Proposed software/license agreements must be reviewed and approved by the Attorney General's Office. The contact for OIT approval is the Project Management Office/External Procurement Unit, [pmo@oit.state.nj.us](mailto:pmo@oit.state.nj.us).

Phone: (609) 633-9101 Fax: (609) 633-0400

C. State Contract Manager

For each waiver submitted by the agency to DPP, the agency shall designate a State Contract Manager for the procurement. The State Contract Manager is the State employee responsible for the overall management and administration of the contract. Upon approval of the waiver by the Treasurer, the Director or the State Contract Manager shall also provide the contractor under the waiver with the State Contract Manager's name, department, division, agency, address, telephone number, fax phone number, and email address. The State Contract Manager is responsible for engaging the contractor, assuring that appropriate Purchase Orders are issued to the contractor, directing the contractor to perform the work of the contract, approving the deliverables, and approving payment vouchers. The State Contract Manager is the person that the contractor will contact **after the contract is executed** for answers to any questions about any aspect of the contract. The State Contract Manager is responsible for coordinating the use of the contract by the agency and resolving minor disputes between the contractor and the State.

The State Contract Manager shall have the following additional duties:

1. If the State Contract Manager determines that the Contractor has failed to perform the work of the contract and is unable to resolve that failure to perform directly with the contractor, the State Contract Manager shall file a formal complaint with the CCAU in the Division of Purchase and Property and request CCAU to assist in the resolution of the contract performance problem with the contractor.
2. The State Contract Manager is responsible for obtaining permission from the Director to reduce the scope of work, amend the contract, or add work or special projects to the contract after contract award.
3. The State Contract Manager is responsible for completion of the Project Performance Assessment Form for submission to CCAU, with a copy to the Deputy Director of OMB; the Project Performance Assessment Form shall be submitted annually for multi-year contracts and upon completion of the contract. For contracts of one (1) year or less, the Project Performance Assessment Form shall be submitted within six (6) months of signing and at project completion.
4. For Professional Service contracts, the State Contract Manager is responsible for submitting the final report to the Deputy Director of OMB.
5. The State Contract Manager is also responsible to formally report, to the Assistant Director of CCAU, using the PB-36 Formal Complaint form, all instances when deliverables, i.e. commodities and/or services, are not in accordance with the contract specifications or scope of work. Variances from contract pricing shall be reported in this same manner to ensure that State and other using agencies receive the goods and/or services at the pricing established at the time of contract award or amendment(s) to the contract.

**D. Competition**

Agencies are required to seek as much competition as reasonable and practical under the circumstances for each waiver requested. Agencies are reminded that regulations require the agency to obtain competition for many of the statutory waiver exceptions. (See N.J.A.C. 17:12-1A.2.) When competition is required, the agency shall attempt to obtain at least four (4) written quotations for the service(s) and/or product(s) contemplated under the waiver.

The competitive process employed by the agency must be:

1. Fair and provide all vendors solicited with the same opportunity to bid; and
2. Provide bidders with the same information concerning the work to be performed and the terms and conditions of the proposed contract to ensure that all vendors are treated fairly and have the same opportunity to bid on the same work requirements under the same terms and conditions.

For all waivers, the agency must provide a thorough evaluation and analysis of the pricing and technical proposals submitted by all bidders to support the award of the contract to the selected vendor.

DPP strongly recommends that communications with vendors throughout the procurement process, including the initial solicitation to bid, be conducted in writing. The preferred method for soliciting competition for waivers is through use of a Request for Quotation (RFQ). (An example of a RFQ may be obtained from the Assistant Director of CCAU.) The process employed to retain a vendor under the waiver must be fully detailed and described in the waiver submission.

**VI. SUBMISSION OF COMPLETE WAIVER PACKAGE**

- A. Required forms (available at <http://www.nj.gov/treasury/purchase/forms.htm>) that must be included in all waivers of advertising packages submitted to CCAU:

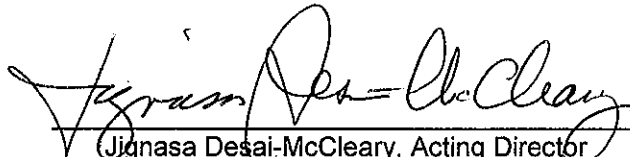
- ☐ Applicable Division of Purchase and Property's Standard Terms and Conditions for products or services
- ☐ Affirmative Action Compliance forms
- ☐ Certification of MacBride Principles, Form PB-MACB
- ☐ Notice of Set-Off for State Tax, Form PBTAX
- ☐ Ownership Disclosure, Form PB-ODF.1
- ☐ Proof of New Jersey Business Registration for the vendor and all subcontractors performing work under the waiver
- ☐ Compliance with N.J.S.A. 19:44A-20.13 et seq., Executive Order # 134 Certification and Disclosure (DPP134-C and D)
- ☐ Compliance with N.J.S.A. 52:34-13.2, form EO 129 Disclosure Certification
- ☐ See Waiver Checklist attached.

- B. The following must also be included in the waiver package:

1. Email from CCAU granting authorization to proceed with the waiver process (reference "Pre-approval" in V. A. above).
2. OMB/OIT approvals if required (reference V. B. above).

3. A certificate of funding will be required for all waivers. Agencies must enter WAO purchase orders onto the MACS-E System for all purchases.
4. Agreement or contract with the vendor, which may include a RFQ, vendor's response, and/or integrated agreement.
5. Name of Contract Manager pursuant to N.J.S.A. 52:34-10.7.

**NOTE:** IT IS THE USING AGENCY'S RESPONSIBILITY TO ENSURE THAT ALL VENDORS SOLICITED ARE IN RECEIPT OF THESE MANDATORY FORMS PRIOR TO THE VENDOR(S) SUBMISSION OF WAIVER QUOTATIONS TO YOUR AGENCY. ANY WAIVER OF ADVERTISING PACKAGE, WHICH DOES NOT CONTAIN ALL OF THE ABOVE-LISTED FORMS, SHALL BE RETURNED TO THE REQUESTING AGENCY.



Jignasa Desai-McCleary, Acting Director  
Division of Purchase and Property



**ATTACHMENT: 11-14-DPP**  
**REQUEST FOR WAIVER OF ADVERTISING (WAIVER) CHECKLIST**

Date: \_\_\_\_\_ Vendor name: \_\_\_\_\_

Department: \_\_\_\_\_ Division: \_\_\_\_\_

Dollar amount of waiver: \$ \_\_\_\_\_ Wavier Number: \_\_\_\_\_

**Please send this completed checklist with your waiver package.**

- ☐ Have you used the most recent revision of the Waiver of Advertising form, PB-129 Rev. 9/05? If you need a supply of the latest revision, please contact Barbara Roberts at 609-633-2372.

The checklist assumes a waiver for a single vendor. If there is more than one (1) vendor, be sure that complete information is submitted for each. The following items should be submitted with your waiver package, before the waiver can be processed.

**CHECK ITEM ONLY IF THERE IS COMPLIANCE WITH THE REQUIREMENT.**

**JUSTIFICATION:**

- ☐ **PRE-APPROVAL:** Have you obtained the required pre-approval from the Division of Purchase and Property's (DPP) Contract Compliance and Audit Unit (CCAU) to use the waiver process? Please send proof, in the form of an e-mail or confirmation of telephone call, with the waiver package.
- ☐ **FORM PB-129 COMPLETION:** Have all Blocks (1 to 17) on the PB-129 form been completed in full?

**IMPORTANT NOTE: Please DO NOT complete blocks 11, 12, or 13 on the PB-129 form with only "SEE ATTACHED". Instead, start the answer in the space given in the block on the PB-129 form and then check "Check here if continued on another sheet" box. Then proceed to give more information on the additional sheet(s).**

- ☐ **DESCRIPTION OF PRODUCT OR SERVICE (BLOCK 11):** Have you submitted a complete description of the product(s) and/or scope of work for services to be performed, from the vendor, with the waiver package?
- ☐ **WRITTEN JUSTIFICATION STATEMENT (BLOCK 11):** Is your written justification statement, in response to form PB-129, block 11, sufficient to justify the waiver, and has it has been submitted, with the waiver package?
- ☐ **COMPETITION (BLOCK 12):** Was competition obtained from a minimum of three (3) vendors?
- ☐ **COMPETITION NOT RECEIVED (BLOCK 12):** If competition was not obtained from a minimum of three (3) vendors, have you submitted a written explanation of what attempts were made to obtain competition, with the waiver package?
- ☐ **CONSEQUENCES FOR NOT MEETING DELIVER DATE (BLOCK 13):** Have you described in detail, how not meeting the delivery date entered in block 4 will adversely affect your agency and included supporting documentation?
- ☐ **OMB APPROVAL:** (Block 14(a)) If OMB approval is required, did you submit the required proof of OMB approval, with the waiver package?

**ATTACHMENT: 11-14-DPP**  
**REQUEST FOR WAIVER OF ADVERTISING (WAIVER) CHECKLIST**

- ☐ **OIT APPROVAL: (Block 14(b))** If OIT approval is required, has the required proof of OIT approval been stamped in the box labeled "OIT APPROVAL" or has a written approval been submitted, with the waiver package?
- ☐ **VENDOR PRICE QUOTATION (BLOCK 15):** Have you submitted *all* vendor(s) price quotations received, including prices and signatures, with the waiver package?
- ☐ **JUSTIFICATION OF VENDOR SELECTION (BLOCK 16):** Does the justification support the statutory citation requested for the waiver?
- ☐ **AUTHORIZED CONFIRMING WAIVERS (BLOCK 17):** For *authorized, confirming* waivers only, have you submitted the completed waiver package to the DPP within three (3) business days of authorization?
- ☐ **AUTHORIZED CONFIRMING WAIVERS (BLOCK 17):** For *authorized, confirming* waivers only, has the required justification statement saying whether the waiver was previously authorized by the DPP been submitted, with the waiver package?
- ☐ **FOR PROFESSIONAL SERVICES ONLY:** Usually waivers using 52:34-9(a). For professional services waivers, are all the following items included, with the waiver package?
  - ☐ Have you included the consultant(s) resume(s)?
  - ☐ Have you included total pricing and rates (preferably firm, fixed pricing and rates)?
  - ☐ Have you included a detailed scope of work?
  - ☐ Have you included a project schedule, including milestones?
  - ☐ Have you identified the State using agency's project manager?
  - ☐ Was the proper commodity class code used? This is usually class NIGP Code Class 918 for professional services.

**FORMS:**

- ☐ **EXECUTED WAIVERED TERMS AND CONDITIONS:** Have you submitted the Waivered Terms and Conditions for **Services** Contracts (**DATED July 31, 2007**) or Waivered Terms and Conditions for **Commodities** Contracts (**DATED July 31, 2007**) with the waiver package? The Waivered Terms and Conditions must be fully executed by the vendor, and submitted with the waiver package. The vendor should not take any exceptions to the State's terms and conditions. *If the vendor has taken exceptions, and the using agency agrees to these exceptions, the using agency should submit a memorandum, in writing, with the waiver package indicating their acceptance of the vendor's exceptions.*
- ☐ **OWNERSHIP DISCLOSURE FOR VENDOR:** Have you submitted an Ownership Disclosure Form (PB-ODF.1 Rev. 12/8/09) executed by the vendor, with the waiver package?
- ☐ **OWNERSHIP DISCLOSURE FOR ALL OWNERS:** Have you submitted Ownership Disclosure Form) (PB-ODF.1 Rev. 12/8/09) executed by *all* partnerships, corporations, and any other owner(s) having a **10% or greater** ownership interest in the vendor, with the waiver package?
- ☐ **BUSINESS REGISTRATION CERTIFICATE:** Have you submitted the required proof of business registration for the vendor, in the form of a copy of the "Business Registration Certificate" (BRC) issued by the Department of the Treasury, Division of Revenue, with the waiver package?
- ☐ **AFFIRMATIVE ACTION EMPLOYEE INFORMATION REPORT:** Have you submitted an Affirmative Action Employee Information Report form, executed by the vendor, or their AA certificate, with the waiver package?

**ATTACHMENT: 11-14-DPP**  
**REQUEST FOR WAIVER OF ADVERTISING (WAIVER) CHECKLIST**

**FORMS CONTINUED:**

- ☐ **MACBRIDE PRINCIPLES FORM:** Have you submitted the necessary "Requirement to Provide a Certification in Compliance with MacBride Principles and Northern Ireland Act of 1989", executed by the vendor, with the waiver package?
- ☐ **VENDOR CERTIFICATION UNDER PUBLIC LAW 2005, CHAPTER 271:** Have you submitted the required form related to the mandatory "Vendor Certification under Public Law 2005, Chapter 271"?
- ☐ **CHAPTER-51 CERTIFICATION AND DISCLOSURE FORM:** Have you submitted all required forms related to Chapter 51 Certification and Disclosure?
- ☐ **EO-129 CERTIFICATION SOURCE DISCLOSURE FORM (***FOR SERVICES ONLY***):** Have you completed and submitted the Source Disclosure Certification Form, if required?
- ☐ **PROOF OF FUNDING AVAILABILITY:** Have you submitted the required proof of funding availability, either in the form of a requisition (PB-6) or "Certificate of Waiver Funding Availability" (PB -129C), with the waiver package?